APPEAL NO. 020940
FILED JUNE 10, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on November 19, 2001. The hearing officer determined that the appellant (claimant) was not injured in the course and scope of employment and did not have disability. The decision was remanded when it appeared that the entity defending the claim, represented to be a self-insured employer, was not self-insured. The Appeals Panel stated: "If the proper carrier is not before the [Texas Workers' Compensation] Commission as a party in this claim, the hearing officer should take appropriate action." The hearing officer ascertained that indeed the employer was insured by an insurance company and was not self-insured, but he canceled the remand hearing, and issued essentially the same decision merely substituting the name of the carrier.

The claimant appealed, arguing that the hearing officer's decision reflects bias and is against the great weight and preponderance of the evidence. The claimant argues that the hearing officer erred in admitting medical records that were not his. The major part of the appeal, however, complains of the hearing officer issuing a new decision, without a second hearing or allowing the claimant to raise any defenses he might have against the respondent (carrier), including the assertion that the claim was not timely disputed by filing a Payment of Compensation or Notice of Disputed Claim (TWCC-21). The carrier responds to this later point by equating the substitution of parties to a clarification of a carrier's name, and argues that because the name of the insurance company was on the benefit review conference (BRC) report, and that the employer and the carrier's interests are "one and the same," the claimant was not deprived of the right to a fair hearing. The carrier otherwise urges that the decision is correct on the merits.

DECISION

Because the Appeals Panel may not remand a second time to cure harmful error in this proceeding, we reverse and render a decision voiding the decision of the hearing officer on the merits considered.

The claimant is clearly right in his contention that the decision improperly states that there was a "stipulation" about the identity of the insurance company as the carrier. There is no such stipulation in this record, either in the form of a signed agreement or a record made at the CCH.

The hearing officer erred, and abused his discretion, by canceling a second remand hearing and by failing to take "appropriate action" as instructed in the Appeals Panel decision when it became apparent that the proper party, the insurance company/carrier, had not been made a party to the proceeding. Notwithstanding the carrier's assertion that the employer and the carrier are "one and the same," they are not.

First of all, it is crystal clear that the employer in this case was not appearing in an employer capacity, but represented that it was a "self-insured" entity. This was untrue. The employer is not a "party" to the CCH unless compensability has been accepted by the carrier. *See* Texas Workers' Compensation Commission Appeal No. 93133, decided May 6, 1993; Texas Workers' Compensation Commission Appeal No. 92137, decided May 21, 1992. Appeal No. 93133, *supra*, details the various distinctions in the 1989 Act that underscore that a carrier and an employer are not interchangeable. We have long held that a carrier with the duty to exchange evidence prior to the CCH may not circumvent its failure to exchange by presenting the same evidence under the Employer's Bill of Rights. Texas Workers' Compensation Commission Appeal No. 951504, decided October 20, 1995.

Further indication in the 1989 Act that the carrier and employer are not regarded as interchangeable is evident in the list of the carrier administrative violations in Section 415.002, one of which is allowing an employer, other than a self-insured employer, to dictate the methods by which, and the terms on which, a claim is handled and settled. Section 415.002(a)(6).

Due process requires that a carrier that is potentially liable for benefits to be afforded notice of and the right to appear in a CCH. *See* Texas Workers' Compensation Commission Appeal No. 941316, decided November 14, 1994. Similarly, a claimant is entitled to raise arguments and defenses that he or she may have against a belatedly discovered carrier. The hearing officer is specifically charged with ensuring the preservation of the rights of the parties and full development of facts required for determinations to be made. Section 410.163(b).

The carrier's argument that the claimant was not deprived of a fair hearing because the name of the insurance company was on the BRC report is specious under the totality of the facts and continuing representations made in the record concerning the "self-insured" status of the employer. Although the name of the insurance company is indeed listed on the October 1, 2001, BRC report, with the respondent's attorney as its representative, earlier and subsequent affirmative representations of the representatives for the employer and it's attorney relegate the BRC report to the status of typographical error.

Such representations include the following:

1) the insurance company is not listed as the carrier on the Employer's First Report of Injury or Illness (TWCC-1), on any TWCC-21 in the record, or on any Texas Workers' Compensation Work Status Report (TWCC-73) forms, all of which precede the date of the BRC. The name of the "carrier" on those documents is shown as an adjusting firm with yet another name.

2) On correspondence and in motions filed by the defense attorney at the time of or after the BRC, the employer is affirmatively represented

to be a "self insured" and the name of the insurance company appears nowhere on those documents.

3) Affidavits from witnesses signed prior to the BRC are styled with the employer identified as the "self insured."

4) Sworn answers by the carrier to the claimant's interrogatories are dated November 12, 2001, signed by a representative of the employer and the attorney for the respondent, and refer in the style and throughout the answers to the employer as the "self-insured."

5) At the CCH, the attorney for the "carrier" represented, and the parties stipulated, that the employer was a self-insured. The attorney furnished a carrier registered agent form to this effect.

6) The response to the claimant's initial appeal emanated from the "self insured"; consequently, it was also represented to this Appeals Panel that the employer was "self insured."

At no time was the employer identified as one disputing compensability under the Employers' Bill of Rights. We have not yet reached the day when "reasonable prudence" requires a party to assume that opposing counsel has been untruthful and we are consequently disinclined to attribute the current state of affairs in this claim to a lack of diligence on the part of the claimant's counsel.

Finally, the assertion by the carrier that the claimant has not been deprived of any rights and that a new proceeding will be merely cumulative is not correct. The 1989 Act imposes several responsibilities on the carrier that are not imposed upon an employer. Substantive arguments or objections arise when these responsibilities are not carried out. The carrier must pay or dispute the compensability of the injury in accordance with Section 409.021; its failure to do so may result in waiver of the dispute or inability. Section 409.021(c); Rule 124.3. The carrier is required to exchange and disclose witnesses. Section 410.160. If it fails to do so, it may not introduce such evidence. When the insurance company was not expressly made a party to the proceeding until named in the remand decision, the claimant was deprived of the opportunity to raise such arguments at a BRC or CCH. The omission of an essential party is not cured because the missing party, after a favorable decision has been rendered, hires the same attorney that represented the nonparty.

It is clear that the dispute has not been litigated with the correct party, and a new proceeding must be initiated by the parties to resolve compensability in the absence of an agreement. Given the history of the representations in this case, the claimant cannot be faulted if he seeks additional verification, going beyond the "amended" registered agent form of coverage by the insurance company named therein. Therefore, we will not analyze

the merits of the decision. But to forestall possible error in the future, we note that we agree with the claimant that the hearing officer erred by admitting medical records from another person with the same name. The employer at the CCH agreed that these were likely the wrong records when the claimant objected to their relevance and timeliness of exchange. Incredibly, these records were nevertheless admitted. We can think of no stronger basis for a well-taken relevance objection than the admitted fact that the medical records tendered are not the claimant's.

Because of harmful error in failing to join the insurance company as a party in a reconvened CCH, and our inability to remand a second time (Section 410.203(c)) the Appeals Panel reverses and renders a new decision that there has been no binding adjudication of the dispute with the proper carrier present, and the decision and order is null and void, and has no precedential effect.

The true corporate name of the insurance carrier is **FEDERAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

PARKER W. RUSH
1445 ROSS AVENUE, SUITE 4200
DALLAS, TEXAS 75202.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Robert E. Lang
Appeals Panel
Manager/Judge

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Robert W. Potts
Appeals Judge